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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1679

MARY C. HACKETT and
JOHN J. AFFLECK,
PETITIONER,

v.

GRINNELL CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provision	2
Statutes Involved	2
Statement of Facts and Travel	3
Issues Presented	5
Reasons for Granting the Writ	6
Introduction	6
Point I	8
Point II	10
Conclusion	12
Appendix A	12
Appendix B	35
Appendix C	45

Table of Authorities

Cases

Almac's v. *Hackett*, 312 F. Supp. 964 (1970) 6, 7, 10

Baker v. *Carr*, 369 U.S. 186 (1962) 10, 11

Chamberlin v. *Andrews*, 271 N.Y. 1, 2 NE 2d 22, *aff'd* 299 U.S. 515 (1936) 7, 10, 11

Dow Chemical Co. v. *Steel Workers*, 41 L.W. 2275 (E.D. Mich. 11/1/72) 8, 11

Francis v. *Davidson*, 340 F. Supp. 351 (D. Md., 1972) .. 8, 11

Grinnell v. *Hackett*, 344 F. Supp. 749 (D.R.I., 1972) ... 2, 6, 7, 9, 10, 11

In Re: George's Claim, 14 N.Y. 2d 234, 199 N.E. 2d 503 (1964) 7

I.T.T. v. *Carter*, C.A. No. 3770 (unpublished, D.R.I. 4/10/67) 6, 8, 9, 10

Page

I.T.T. v. *Minter,* 435 F. 2d 989 (C.A. 1, 1970) 5, 7, 11

Kelly v. *Catherwood,* 29 N.Y. 2d 877, 278 N.E. 2d 649 (1972) 7

San Diego Building Trades Council v. *Garmon,* 359 U.S. 256 (1959) 6, 8, 9

Statutes

28 U.S.C., §501, et seq. 2

§601, et seq. 2

§1254(1) 2

42 U.S.C., §503 10

§602(a)(23) 8, 10, 12

General Laws of Rhode Island,

§28-44-1, et seq. 3, 10

§28-44-16, et seq. 10

§40- 6-7, et seq. 3

§40- 9-1, et seq. 10

Art. 18, §592, New York Statutes 7

Constitutional Provisions

United States Constitution, Article I, Section 8 2

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v.

GRINNELL CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Attorney General of Rhode Island, on behalf of Mary C. Hackett, Director of the Rhode Island Department of Employment Security, and on behalf of John J. Affleck, Director of the Rhode Island Department of Social and Rehabilitative Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case March 15, 1973.

Opinions Below

The opinion of the Court of Appeals is not yet reported; it appears as Appendix A to this petition. The District Court opinion (Appendix B) appears at 344 F. Supp. 749 (1972).

Jurisdiction

The judgment of the Court of Appeals was entered March 15, 1973, and appears as Appendix C hereto. We invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Constitutional Provision

Article I, Section 8 of the United States Constitution provides in part:

> "§8 *Powers granted congress.* — The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
>
> To borrow money on the credit of the United States;
>
> To regulate commerce with foreign nations and among the several states, and with the Indian tribes;"

Statutes Involved

42 U.S.C. § 501 et seq authorizes the United States Department of Health, Education and Welfare to assist state employment security programs.

42 U.S.C. § 601 et seq authorizes the United States Department of Health, Education and Welfare to assist state public assistance (welfare) programs.

§ 28-44-1 et seq G.L.R.I. (1956) (1968 Reenactment) authorizes petitioner Hackett to pay employment security benefits, *inter alia,* to persons on strike.

§ 40-6-7 et seq G.L.R.I. (1956) (1969 Reenactment) (as amended) authorizes petitioner Affleck to pay public assistance to families with dependent children if needy, *inter alia,* by reason of a strike.

Statement of Facts and Travel of the Case

As will be seen further on in this memorandum, this litigation is the first of several such cases to arise in Rhode Island to achieve appellate review. One such case arising in Massachusetts has achieved appellate review; it is the thesis of this memorandum that the results of such review are inconsistent and confusing to petitioners in carrying out their duties of applying federal law. Moreover, the results coming from the United States Court of Appeals for the Frst Circuit are inconsistent with the apparent decisions of the Supreme Court of the United States arising in other circuits. Thus, your petitioners are in considerable doubt as to whether federal law is in conflict and how they should apply the Social Security Act vis-a-vis the National Labor Management Relations Act, 29 U.S.C. § 141 et seq.

Grinnell operates a plant in Cranston, Rhode Island. After months of fruitless negotiations, the collective bargaining agreement with Local 4756 of the United Steelworkers expired on March 19, 1972. The next day all 585 employees at the plant marched out on strike.

About as simultaneous as human activity can be, all or virtually all of these strikers marched to defendant Hackett's office to apply for unemployment compensation under G.L.R.I. (1956) §§ 28-44-1 through 61. That statute authorizes payments of unemployment compensation to

strikers directly participating in the strike against their employer after a period of seven weeks.

Hackett began to effect payment of unemployment compensation beginning about May 8, 1972.

For the week ending May 13, 1972, 404 of the strikers received a total of $31,190 in unemployment compensation payments.

In addition, as of May 30, 1972, 80 strikers had applied for welfare and 69 had been found initially eligible, with 16 still receiving benefits as of that date. The average monthly welfare benefits were $280.

Also, as of May 30, 1972, 137 strikers had applied for and been found eligible for food stamps, with 14 still receiving benefits as of that date. The average value of the stamps was $44 per month.

No strikers received both unemployment compensation and welfare at the same time, but some received both unemployment compensation and food stamps at the same time.

On April 26, 1972, the strikers rejected Grinnell's offer to settle the dispute despite recommendations that the offer be accepted made by the representative of the international and by the negotiating committee of Local 4756 itself.

On the other hand, Grinnell so far from receiving economic assistance from the state, alleged an economic loss of approximately $90,000 per week during the strike. Less tangible but still real, it alleged the threat of losing its position in the foreign and domestic markets.

Grinnell sued in the United States District Court for the District of Rhode Island for preliminary and permanent injunction against payment of unemployment compensation, public assistance and food stamps. The gravamen of its verified complaint was that this economic assistance from the state, particularly the unemployment compensation benefits, altered the relative economic

strength of the parties and interfered with Grinnell's right to free collective bargaining in an area preempted by federal legislation.

Defendants moved to dismiss the complaint, citing *I.T.T.* v. *Minter*, 435 F.2d 989 (C.A. 1, 1970).

The court heard the plaintiff's motion for a preliminary injunction and the defendants' motion to dismiss on May 30 and 31, 1972.

The court announced its decision denying the plaintiff's motion for a preliminary injunction and granting the defendants' motion to dismiss on June 15, 1972. Holding that there was no infringement as a matter of law, the court made no findings of fact on the issue of infringement of the federal collective bargaining process. The court entered the order dismissing the complaint on June 26, 1972.

The Court of Appeals for the First Circuit decided the case in an opinion dated March 15, 1973; the Court of Appeals reversed the Chief District Judge and remanded the matter for trial. It is the position of the petitioners that the Court of Appeals erred in holding the issues presented to be justiciable and that the Court of Appeals erred in holding that any state of facts could be proven which would establish that the payment of welfare benefits or unemployment compensation to strikers constitute state interference in federally protected collective bargaining.

Issues Presented

Does an award of welfare benefits to strikers intrude upon the collective bargaining process to an impermissible degree?

Does the award of unemployment compensation to strikers impermissibly intrude upon collective bargaining?

Does an award of unemployment benefits after a waiting period, combined with an award of public assistance during the waiting period impermissibly intrude upon collective bargaining?

Reasons for Granting the Writ

Introduction

This case involves a determination of whether the payment of unemployment security benefits to men on strike, after a waiting period, constitutes an infringement upon federally protected collective bargaining under the National Labor Management Relations Act, 29 U.S.C. § 141 et seq as defined in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 256 (1959). This issue first came before the District Court in *I.T.T.* v. *Carter,* C. A. No. 3770 (unreported 4/10/67). The District Court in that case held as a matter of law that such payments were not an invasion of collective bargaining. Review was sought, but the strike was settled and the Court of Appeals for the First Circuit determined that the matter was moot and declined review. The matter arose again in *Almac's* v. *Hackett,* 312 F. Supp. 964 (D.R.I., 1970). Again, the District Court determined as a matter of law that the payment of unemployment benefits to strikers after an appropriate waiting period, did not violate federally protected bargaining. That brings us to the commencement of the case; again the District Court held that as a matter of law the payments were proper. The only aspect of *Grinnell* v. *Hackett* which distinguished it from the *I.T.T.* and *Almac's* cases is that defendant Affleck authorized the payment of public assistance to strikers during the statutory waiting period, during which strikers were not entitled to unemployment benefits.

The same basic question arose in Massachusetts about

the same time as the *Almac's* case. In *I.T.T.* v. *Minter*, 435 F.2d 989 (C.A. 1, 1970) a Massachusetts employer had challenged the right of the Massachusetts Director of Welfare to pay such assistance to strikers. The Circuit Court agreed to review the decision of the District Court on the basis of a recurring controversy; we will discuss this opinion more thoroughly later in the memorandum. Suffice to say at this point that the court held that the conflict between federal statutes probably was not justiciable and that the payments were proper. Thus, the Rhode Island District Court in its decision in *Grinnell* v. *Hackett*, 344 F. Supp. 749 (D.R.I., 1972) relied on *I.T.T.* v. *Minter, supra,* in its decision of June 15, 1972.

Thus, it would appear that as of June 15, 1972 the First Circuit Court of Appeals was in agreement with the cases arising in New York. First of these was *Chamberlin* v. *Andrews,* 271 N.Y. 1, 2 N.E.2d 22, *aff'd* 299 U.S. 515 (1936). It may well be argued that *Chamberlin* did not in terms address the issue now sought to be brought before this court. However, the New York Court has since so interpreted the *Chamberlin* case. In *In Re George's Claim,* 14 N.Y.2d 234, 199 N.E.2d 503 (1964) the New York Court sustained *Art.* 18 § 592, *McKinney's New York Law* against a constitutional challenge saying:

> "As to the argument under the supremacy clause (U.S. Const., art. VI, §2) that section 592 invalidly regulates interstate commerce, it is sufficient answer to say that the constitutionality of our unemployment insurance law has been upheld (W.H.H. Chamberlin, Inc. v. Andrews, 159 Misc. 124, 286 N.Y.S. 242, Mod. 271 N.Y. 1, 2 N.E.2d 22, 106 A.L.R. 1519, aff'd. 299 U.S. 515, 57 S. Ct. 122, 81 L. Ed. 380."

Even more recently the New York Court in *Kelly* v.

Catherwood, 29 N.Y.2d 877, 278 N.E.2d 649 (1972), treated the issue as foreclosed by a decision of the Supreme Court of the United States. Thus, the law in New York clearly is that as a matter of law unemployment compensation may be paid to strikers.

We point to additional conflicts; the law of the Fourth Circuit apparently is determined by *Francis* v. *Davidson,* 340 F. Supp. 351 (1972). In this case a three-judge Maryland District Court determined that the refusal on constitutional grounds by Maryland to pay strikers public assistance was a violation of welfare law, 42 U.S.C. § 602(a)(23). Thus, the federal law of Maryland is that such payments of welfare may be properly paid to strikers. Finally, the issue is now being litigated in Michigan. Dow Chemical Company has brought an action to challenge the payment of welfare to strikers. *Dow Chemical Co.* v. *Steel Workers,* 41 L.W. 2275 (11/1/72). It is against this background that the First Circuit Court of Appeals in fact overruled *I.T.T.* v. *Minter.*

POINT I

The United States Court of Appeals for the First Circuit in *I.T.T.* v. *Minter,* 435 F.2d 989 (C. A. 1, 1970) analyzed the relationship between a state program authorized by 42 U.S.C. § 602 and the right to freely and independently collectively bargain as determined by this court in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 256 (1959). While *Minter* may have hedged on the rule prevailing in New York, it allude to the difficulty in establishing any improper infringement as follows:

> "This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon would have to undertake, indicates the preferable forum

> to be the Congress. Congress would be particularly appropriate in resolving this issue. The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program. Congress has established the minimal requirements with which participating state welfare plans must comply. 42 U.S.C. § 602, et seq"

It, therefore, held that there might be some infringement but that it was not for the courts to decide. The court concluded that as a matter of law there was no infringement:

> ". . . we have substantial doubt that a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers or that, even so, the state interest is so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest."

In any event, the court was finally convicted that *Minter* was not a *Garmon* case. *Grinnell* challenged the *Minter* rule. While the *Grinnell* opinion says that it is not a *Garmon* case, the court reversed the broad reading of *Garmon* given previously. Early in the opinion in *Grinnell* the court seems to distinguish *Garmon,* but then calls for a balancing process where the degree of infringement is to be weighed. In essence, the court now holds that infringement is a matter of fact, not of law. The court goes on to outline in some detail the issues to be proved which it had said in *Minter* were "macrocosmic" inferring that the issues were beyond the capability of a court. *Grinnell,* therefore, brings the First Circuit directly in conflict with the Second and Fourth Circuits. There is no question that the

issue presented by this case is novel; other than the old per curiam opinion in *Chamberlin, supra,* the court has never spoken to this issue. There is no doubt that the question is important; with respect to the administration of state programs such as §§ 40-9-1 *et seq,* G.L.R.I. (1956) under 42 U.S.C. § 602, an apparent conflict with the National Labor Management Relations Act must be resolved.

All the same arguments are to be made with respect to the payment of unemployment compensation. The state statutes, §§ 28-44-1 *et seq,* G.L.R.I. (1956) are said to be in conflict with collective bargaining. The law of this jurisdiction seemed to be settled by *I.T.T.* v. *Carter, supra* and *Almac's* v. *Hackett, supra; Grinnell* places that question in doubt, and in like conflict with *Chamberlin* v. *Andrews, supra.* By the same token, the question is novel and important. The administrators of state unemployment compensation programs are entitled to know whether § 28-44-16, G.L.R.I. invalidly trespasses on collective bargaining. A reading of *Grinnell* v. *Hackett* will disclose that the issues to be proven are indeed "macrocosmic" and probably incapable of proof.

Since the payment provisions are sequential and not redundant, it adds nothing to the case that both are paid. All that is accomplished by the opinion in *Grinnell* v. *Hackett* is to place the validity of two Rhode Island programs, both authorized by federal law, see 42 U.S.C. §503, in question and in conflict with the law in the Second and Fourth Circuits.

POINT II

The decision in *Grinnell* v. *Hackett, supra,* is a substantial deviation from the previously established rules defining the justiciability of political question, and so this court should exercise its supervisory jurisdiction and issue its Writ of Certiorari. In *Baker* v. *Carr,* 369 U.S.

186, 210 (1962) the court defined the limits of its jurisdiction as:

> "The appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

Apparently, both the Second and Fourth Circuits reason implictly that the interrelationship between the acts of Congress is one for determination by the Congress not by the court. As noted above, the First Circuit Court in *I.T.T.* v. *Minter, supra,* believed that "Congress would be particularly appropriate in resolving this issue." Granted, the court shied away from a determination that the issue was not justiciable by stating that Congress is the "preferable forum". An examination of the interlocutory opinion in *Dow Chemical Company* v. *Steel Workers,* 41 L.W. 2275 (E.D. Mich. 11/1/72) implies that the Michigan court is following the First Circuit in breaking away from the notions of justiciability expressed in *Francis* v. *Davidson, supra, Chamberlin* v. *Andrews, supra,* and *Minter, supra.* Using the Baker definition, a reading of the Grinnell opinion making patent the lack of satisfactory criteria for a justiciable determination. The catalog of matters to be considered and value judgments to be made clearly indicates that the subject matter is appropriate for a congressional hearing not a trial. It is for the Congress to determine whether one of its programs should be extended to those engaged in industrial controversy; it is for Congress to determine whether a person in industrial controversy is sufficiently in need to warrant the extention of Social Security benefits in the face of sanitary collective bargaining. It is thus that the First Circuit in *Grinnell* v. *Hackett* has taken itself and

Michigan District Court away from traditional notions and into conflict with the Second and Fourth Circuits.

This Honorable Court, should, therefore, issue its Writ of Certiorari to review this matter and to define the extent to which the conflict, if any, between the Social Security Act and the National Labor Management Relations Acts is appropriate for judicial determination. Nothing can have more wide spread consequences, since almost every state, if not every state, participates in the welfare program in 42 U.S.C. § 602 and since the rights of employers and employees in Rhode Island, Michigan, New York and Maryland should, with respect to federal law, be the same, and be the same as those of employers and employees in all the other states.

Conclusion

For all the above reasons petitioner urges this court to issue its Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 72-1275
72-1276

GRINNELL CORPORATION,

PLAINTIFF, APPELLANT,

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND,

DEFENDANTS, APPELLEES,

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and THE GREATER PROVIDENCE CHAMBER OF COMMERCE,

INTERVENORS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

George M. Vetter, Jr., with whom *William R. Powers III*, *David D. McKenney*, and *Hinckley, Allen, Salisbury & Parsons* were on brief, for Grinnell Corporation.

Lawrence M. Cohen, with whom *Milton Smith*, *O. F. Wenzler*, *Jeffrey S. Goldman*, *Guy J. Wells*, *Gerard C. Smetana*, *Lederer, Fox and Grove*, and *Gunning, LaFazia, Gnys & Seyla, Inc.* were on brief, for The Chamber of Commerce of The United States of America and The Greater Providence Chamber of Commerce.

Warren H. Pyle, with whom *Angoff, Goldman, Manning, Pyle & Wanger* were on brief, for intervenor, United Steelworkers of America, AFL-CIO.

W. Slater Allen, Jr., Assistant Attorney General, with whom *Richard J. Israel*, Attorney General, was on brief, for appellees.

March 15, 1973

COFFIN, *Chief Judge.* This case brings before us again the complex question whether state financial aid to striking workers, here unemployment compensation benefits, is preempted by the federal labor statutes and policy. We initially wrestled with that preemption question in a case involving state and federal welfare benefits made available to strikers. *ITT* v. *Minter,* 435 F.2d 989 (1st Cir. 1970), *cert. denied,* 402 U.S. 933, *reh. den.,* 404 U.S. 874 (1971). *See* Note, *Welfare for Strikers: ITT* v. *Minter,* 39 U. Chi. L. Rev. 79 (1971).[1]

On March 20, 1972, after unsuccessful negotiations for a new collective bargaining agreement between the plaintiff and Local 4756 of the United Steelworkers of America, all 585 of the plaintiff's employees went on strike. Some of them applied for and received welfare assistance, both state General Assistance, § 40-6-8 General Laws of Rhode Island (R.I.G.L.) (1971 Pocket Supp.), and federally assisted AFDC-U benefits (aid to families with unemployed fathers), R.I.G.L. § 40-6-7, 42 U.S.C. § 607; and food stamps, 7 U.S.C. §§ 2011-15.[2] As of the week ending May 13, 1972, 404 of the plaintiff's employees received unemployment compensation benefits, R.I.G.L. §§ 28-44-1 *et seq.,* under a special provision which permits payments of such benefits, after the general one-week waiting period (§ 28-44-14) and a special additional six-week period, to individuals "unemployed because of a strike", R.I.G.L. § 28-44-16.

On May 15, plaintiff filed the complaint in this case, seeking a preliminary and permanent injunction against the defendants Hackett and Affleck, who are the directors,

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[1] *See also* Note, *Congressional Preemption in Labor Relations,* 6 Suffolk U. L. Rev. 263 (1972); Note, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited,* 67 Nw. U. L. Rev. 245 (1972); *Lascaris* v. *Wyman,* No. 170 (N.Y. Ct. App. Dec. 29, 1972).

[2] No questions regarding the welfare payments or food stamps are before us.

respectively, of the Departments of Employment Security and Social and Rehabilitation Services of the State of Rhode Island. The defendants moved to dismiss for failure to state a claim upon which relief could be granted and subsequently filed an answer alleging failure to state a claim, lack of conflict between the federal and state statutes, and failure to join an indispensable party, the local union. The United Steelworkers of America, AFL-CIO, and the Chambers of Commerce of the United States and Greater Providence sought and were granted leave to intervene.

On May 30 and 31, the district court held a hearing on the motion for preliminary injunction at which the plaintiff presented three witnesses, two of whom, Armand Thieblot and Ronald Cowin, were co-authors of a study entitled "Welfare and Strikes: The Use of Public Funds to Support Strikers". The book, which was also introduced as an exhibit, was explicitly an attempt to answer some of the empirical questions which we indicated in *Minter* a court would have to consider in deciding the preemption issue. An affidavit by Herbert Northrup, the supervisor of the project at the University of Pennsylvania School of Finance which led to the book, was also introduced as an exhibit. Defendants presented two brief witnesses, one of whom was the defendant Hackett, and one exhibit, "Handbook of Labor Statistics 1971" published by the United States Department of Labor.

In its opinion, issued on June 15, the district court attempted to discern whether under *Minter* it could consider evidence as to the impact of unemployment benefits on federal labor policy and, if so, whether such evidence could overcome the state interest supporting the unemployment compensation scheme. It initially quoted at length the relevant portions of our opinion in *Minter*, which had come to us on a denial of a preliminary injunction on the pleadings. We there first noted that in labor preemption

cases involving an alleged tangential frustration of national labor policy, rather than a direct overlap of state and federal regulations of labor activities as in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), "a balancing process seems called for... in which both the degree of conflict and the relative importance of the federal and state interests are assessed." 435 F.2d at 992. After noting our hesitance at making any *a priori* judgments regarding either the extent of conflict or the relative strengths of the federal and state interests, we described some of the questions of general scope which a court would have to consider, as to both issues, if a case went beyond the pleadings. We then stated that

> "This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon would have to undertake, indicates the preferable forum to be the Congress." 435 F.2d at 993-94,

and noted the strong likelihood that Congress was aware of this problem. We concluded:

> "In sum, wholly apart from the inadequacy of the evidence before the district court, we have substantial doubt that a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers or that, even so, the state interest is so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest." 435 F.2d at 994.

The district court here, after quoting these and other passages, found "no distinctive difference" between the Rhode Island unemployment scheme and the Massachusetts welfare scheme upheld in *Minter*; ruled that the former's purpose was "to protect citizens against economic vicissitudes" and was "hardly abandoned" by the six-week waiting period; noted that "[i]t also appears that many of

the Grinnell strikers would be receiving welfare were they not receiving unemployment compensation", that Congress was not unaware of the problem, and that the state interest in "the well-being of its unemployed and ultimately for the health of the local community" was substantial. The court then held that the preemption issue was not justiciable but that in any case "The state's interest is so substantial that this Court will not conclude that Congress has excluded such state action." *Grinnell Corp.* v. *Hackett*, 344 F. Supp. 749, 753-54 (D. R.I. 1972). For these reasons, it denied the preliminary injunction, granted the motion to dismiss and made no findings on the issue of infringement of the federal collective bargaining process. The plaintiff and the two Chambers of Commerce appealed from the subsequent order to that effect.[3]

We are unable to affirm the district court on either ground of decision. First, we continue to believe, as we indicated in *Minter*, that the preemption issue is justiciable, albeit complex. Moreover, for reasons that we will develop more fully later, on the present record we are not able to determine whether the state interest in unemployment compensation is the same, or as substantial, as the state interest in welfare, as the district court seemed to believe, and we have substantial doubts whether that issue need even be reached. At the same time, we have serious doubts whether the existing record is sufficient to meet the plaintiff's burden of showing the probability of establishing that the Rhode Island unemployment compensation program substantially disturbs the collective bargaining process.

[3] In addition to the briefs of the parties, the court made use, after providing the parties with notice and an opportunity to respond, *see* Code of Judicial Ethics Canon 3A(4), of the briefs of the student contestants in the Harvard moot court finals competition. Although the case used there, entitled *Agar Chemical Corp.* v. *Taylor*, was fictitious, it was patterned roughly after *Dow Chemical Co.* v. *Taylor*, 41 U.S.L.W. 2275 (E.D. Mich. Nov. 1, 1972), and contained many of the issues involved in this case.

Since, however, it is not for us to make findings of fact, we vacate the denial of a preliminary injunction. We also reverse the dismissal of the complaint for failure to state a cause of action, being unable to rule categorically that no evidence could be presented which would support the claim, *see Dow Chemical Co.* v. *Taylor, supra* n. 3 (refusing to dismiss complaint alleging federal preemption of unemployment benefits to strikers). Since a remand is necessary, and further evidence may be presented, we will discuss the issues in the order that we believe a court should generally follow when faced with this question. After considering justiciability, we will examine whether "Congress has unmistakably ordained" that states not exercise power in this area. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963); *Armour & Co.* v. *Ball,* 41 U.S.L.W. 2229 (6th Cir. Oct. 13, 1972). Finding no such clear manifestation, we will then comment on the nature of the infringement issue, the inadequacy of the present record and suggest possible other evidence that might be more relevant and persuasive. Finally we will consider the state interests and the factual inquiries that might be material in that regard.

JUSTICIABILITY

Justiciability is, of course, as *Baker* v. *Carr,* 369 U.S. 186 (1962), taught, distinguishable from subject matter jurisdiction, which was here properly not disputed, a civil action wherein the matter in controversy exceeds $10,000 arising under the Constitution and laws of the United States, 28 U.S.C. § 1331, in particular an Act of Congress regulating commerce, 28 U.S.C. § 1337. Justiciability concerns the propriety of judicial decision in light of the posture of the controversy or, as here, the distribution of functions among the coordinate branches of the federal government. Two formulations of nonjusticiability arguably applicable here are "a lack of judicially discoverable and manageable

standards for resolving [the case]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion", 369 U.S. at 217. The district court interpreted *Minter* as saying that "the issue is one for decision by the Congress, not the Courts." 344 F. Supp. at 754. Although we did indicate there and still believe that the complexity and generality of the issue made Congress "the *preferable* forum", 435 F.2d at 994 [emphasis added], we did not say that the questions were therefore beyond the ken of the courts. Indeed, we spoke frequently of what "a court would" or "must" do "if called upon" by appropriate evidence. *Id.* at 993. Moreover, our sketching of the appropriate analysis, with relevant citations to other preemption cases, suggested that judicially manageable standards have been discovered by the Supreme Court and that courts are competent to determine, solely by the exercise of judicial judgment upon relevant evidence, whether Congress' initial policy determinations or the nature and effect of the federal and state policies at issue require a finding of preemption. Finally the very fact of our decision on the merits, and the Supreme Court's many decisions on the merits in labor preemption cases, even of the non-*Garmon* variety, *see, e.g., Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964), indicate that the issues are justiciable. Although it is possible that a complete evidentiary record, along the lines suggested herein, might ultimately convince us that judicial fact-finding and decision-making are unmanageable or impossible in unusual preemption cases such as this, *see* discussion *infra*, we cannot, on the present record and the present state of our knowledge, say that as to the issues here, unlike all other preemption issues, Congress is not just the preferable, but the only forum.

Before leaving justiciability, we feel compelled, in light of the position taken by appellee's counsel at argument, to

reaffirm our holding in *Minter* that a case such as this is not moot, although the particular strike which prompted the suit and the payment of benefits challenged have, as here, terminated by the time of appeal. We are unable to say that the issue will not recur with regard to this very plaintiff—one strike of the length requisite to raise the issue has now taken place at its plant and nothing in the record suggests the unlikelihood of future repetition. *See General Dynamics Corp.* v. *Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,* 469 F.2d 848 (1st Cir. 1972). Moreover, the intervening Chambers of Commerce, who have filed their own complaint for declaratory and injunctive relief, represent many other employers in Rhode Island, as to at least some of whom the issue is certain to recur.

CONGRESSIONAL INTENT

If Congress has made clear its intent, either to preempt or not to preempt, no further inquiry is required. Yet, if the intent is not unmistakable, and evidence and legal analysis must be undertaken, Congressional awareness of the problem and its ability to resolve it finally and specifically, may, as we said in *Minter,* in a closely balanced situation, be sufficient justification for upholding the state action. We find that although the existing legislative record is not sufficiently clear to establish Congressional intent either way, it strongly indicates Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters which would prove relevant should the evidence on infringement and state interest be closely balanced.

In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. Brown, *Public Relief 1929-39,* 270 (1940). This

policy became a bone of contention during the textile strike of September 1934. Bernstein, *The Turbulent Years: A History of the American Worker 1933-41*, 307 (1971). Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act, 49 Stat. 449, and the Social Security Act, 49 Stat. 620, Title IX of which, 49 Stat. 639-645, is now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-09. Indeed, in detailing the requirements for state laws that would exempt employers from the federal unemployment tax, Congress specifically established three conditions to insure the compatibility of state unemployment compensation laws with the then brand-new labor statute—unemployment compensation could not be denied to an otherwise eligible individual for refusing to accept new work (1) if the position offered was vacant due directly to a labor dispute, (2) if the wages for the offered job were substantially less favorable than those prevailing locally for comparable work or (3) if a condition of the offered employment was membership in a company union or resignation from a bona fide union. § 903(a)(5), 49 Stat. 640, 26 U.S.C. § 3304(a)(5).[4] Certainly, had it thought it necessary to preserve its labor policy, Congress could also have required state laws to bar payment of benefits to strikers. Moreover, pursuant to § 3304(a) the Social Security Board, presumably aware of the Congressional intent, approved, within the next few years, four state laws which allowed payments to strikers. Ch. 468, § 504(2)(b), 1-1935 N.Y. Laws 1033, *as amended* N.Y. Labor Law § 592(1) (McKinney 1965); 1935-36 R.I.Pub. Laws 848 (1936), *as amended* R.I.G.L. § 28-44-16; Act No. 1, § 401(e), 2-1937 Pa. Laws 2913 (2d Extra Sess. 1936) (repealed 1947), *see* 43 Pa.

[4] The Rhode Island statute contains, of course, these necessary provisions, R.I.G.L. § 28-44-20, as well as the provision for payment to strikers, § 28-44-16.

Stat. Ann. § 802(d); No. 164, § 4(d), 1938 La. Acts 394 (repealed 1946), *see* 23 La. Rev. Stat. Ann. § 1601(4).

In 1947, the Hartley bill, passed by the House, provided that a striker who accepted unemployment compensation benefits would no longer be considered an "employee" under the National Labor Relations Act, § 2(3), H.R. 3020, 80th Cong., 1st Sess. (1947), and thus would lose all rights under the Act, because, as the committee report indicated, such benefits were "a perversion of the purposes of the social security laws". H.R. Rep. No. 353, 80th Cong., 1st Sess. 12 (1947). In conference, however, the provision was dropped without explanation. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-39. Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem.

More recently, in 1969, President Nixon, in a message to Congress, specifically proposed a requirement that states deny unemployment benefits to strikers. Message from President Nixon, Hearings Before the House Committee on Ways and Means on H.R. 12625, 91st Cong., 1st Sess. at 12 (1969). The Committee, however, deleted the provision in creating a substitute bill (H.R. 14705), H.R. Rep. No. 612, 91st Cong., 1st Sess. (1969), because, as Chairman Mills explained briefly on the floor of the House in the course of discussing other aspects of the bill:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people.... For example, there are two States ... which will pay unemployment benefits when employees are on strike.... [I]f the State wants to do it we believe they ought to be given

> latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (1969).

The House passed the substitute bill without amendment or further discussion of this deletion, 337 to 8, 115 Cong. Rec. 34110-11 (1969). The following year, the Senate considered the House bill, which made, of course, no mention of the striker benefits issue. In the course of explaining a provision preventing states from cancelling an individual's benefit credits because of an act which disqualified him under state law from receipt of benefits for the subsequent period of unemployment, the Senate Finance Committee Report stated:

> "It would not prevent a State from specifying the conditions for disqualification such as for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc. ... It would not preclude disqualifications which only postpone the receipt of benefits for a specified or flexible number of weeks." S. Rep. No. 752, 91st Cong. 2d Sess. (1970); 1970 U.S. Code Cong. & Admin. News 3606, 3627.

Although during the course of the Senate debate, 116 Cong. Rec. 10573-90 (1970), this provision preventing cancellation of credits was described, *id.* at 10575, no mention was made of either the state disqualifications for labor disputes or of the striker benefits issue. Neither the Conference Report, Conf. Rep. No. 1037, 91st Cong. 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 3646, nor the subsequent floor debates—116 Cong. Rec. 25608-17 (House), 27305-23 (Senate) (1970)—made any mention of the issue. We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of

any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers.

Congress has, on the other hand, shown its ability to act specifically and directly in other, closely related areas. In the Railroad Unemployment Insurance Act, 52 Stat. 1094 (1938), *as amended* 45 U.S.C. §§ 351-367, Congress explicitly provided that only those engaged in unlawful strikes were disqualified from unemployment benefits. 45 U.S.C. § 354(a-2)(iii). A recent Administration bill to repeal this provision, S. 560, 92nd Cong., 1st Sess. (1971), did not pass. Similarly, in 1971, Congress amended its original scheme in which the states were allowed to set eligibility standards for the Food Stamp Act, § 5(b), 78 Stat. 703, 704 (1964), and required the Secretary of Agriculture to set "uniform national standards of eligibility". 7 U.S.C. § 2014(b) (1972 Supp.) Although it specifically required a national standard disqualifying households with able-bodied adults who refuse to register or accept employment, Congress added a proviso:

> "Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment." 7 U.S.C. § 2014(c) (1972 Supp.).

The stated reason for this provision and rejection of a provision disqualifying strikers was Congress' determination not "to take sides in labor disputes", H.R. Rep. No. 1402, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 6025, 6035, a phrase reminiscent of the FERA policy. Likewise, in the AFDC-U program, Congress, after initially leaving the determination of standards to the state, § 407, 75 Stat. 75, insisted in 1967 that the Secretary of Health, Education and Welfare determine the

standard of unemployment, 42 U.S.C. § 607(a),(b)(1)(A). In *Davidson* v. *Francis,* 409 U.S. 904, 1972), the Supreme Court affirmed the judgment of a three-judge court, 340 F. Supp. 351 (D. Md. 1972), which construed literally the language of the subsequent regulation, 45 C.F.R. § 233.100, holding that "any father" included one working less than the requisite hours because of a strike and finding no preemption problem with such aid, citing *Minter.* Thus, presently federal law also requires payment of AFDC-U benefits to strikers in the 24 states participating in that program.[5]

The existence and interpretation of these provisions in analogous programs might be read as indicating a broad Congressional intent not to preempt payments to strikers under public assistance statutes. Yet, given the ability of Congress to articulate that intent in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. That, too, however, is not a reasonable inference, given the pre-1935 policy, the 1935 Acts and the rejection of explicitly prohibitory legislation in both 1947 and 1969. The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.

Since unambiguous Congressional intent is lacking, a court must consider the following questions: does the payment of unemployment compensation benefits to strikers "palpably infringe" upon federal labor policy? *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U.S. 761, 766 (1945), and is the state interest in cushioning the impact

[5] The Secretary of Health, Education and Welfare is presently in the process of revising the definition. Also, a bill introduced in the last Congress, as an amendment to the Administration's Family Assistance Plan, would have denied strikers such assistance. H.R. 6004, 92nd Cong., 1st Sess. (1971).

of unemployment stronger than the federal interest in untrammelled collective bargaining? Although a negative answer to the first question or an affirmative answer to the second would, strictly, dispose of the case, a district court would be well advised to consider both issues, as it considers both patent validity and infringement in a patent case. Naturally, if palpable infringement is found, the strength of the state interest must be explored; and if the state interest is first approached and found not more compelling than the federal interest in free collective bargaining, then the issue of palpable infringement must be inquired into. Should a court, however, find infringement but also that the state and federal interests are closely balanced, it could properly decline to find preemption because of the historical and continuing Congressional awareness, opportunity, and demonstrated willingness to act in this field.

INTERFERENCE WITH LABOR POLICY

Since the district court has explicitly declined to make any findings on the issue of infringement, and in any event on remand this issue remains open, we think it well to alert court and counsel to critical problems of relevance posed by the study and testimony thus far put into evidence.

We note initially the need to define precisely the infringement question relevant to unemployment benefits. The Rhode Island unemployment compensation for strikers statute under attack here, like its sole companion in the state of New York,[6] does not provide strikers with benefits from the start. Rather it imposes, in addition to the general waiting period for all unemployed claimants, § 28-44-14, an additional six-week waiting period for striking claimants, § 28-44-16.[7] It is thus fundamentally different from

[6] N.Y. Labor Law § 592(1) (McKinney 1965).

[7] New York law imposes effectively an eight-week waiting period

state welfare programs and the federal food stamp program which provide for payments immediately upon a showing of need.[8] The relevant question then in determining this statute's impact upon the federal collective bargaining policy is whether the receipt or expectation of receipt of unemployment compensation benefits after seven weeks of a strike causes workers to stiffen bargaining demands beyond those they would have made without such benefits, to strike in the first instance when they would otherwise have settled, or to continue a strike for a longer period than they otherwise would.[9]

To date, plaintiff has not addressed this question directly. Rather it has relied on an extensive empirical study

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—a general "four effective days" period, N.Y. Labor Law § 590(9) (McKinney 1965), and a special additional seven-week period for strikers. *Id.* § 592(1). In Michigan, strikers can apparently claim unemployment compensation benefits after obtaining, and being laid off from, interim employment. *See Dow Chemical*, *supra* n. 3.

[8] General Assistance — R.I.G.L. §§ 40-6-5, 8, 22, § 40-5-1 (1971 Pocket Supp.); N.Y. Social Services Law §§ 131, 158 (McKinney 1972-73 Pocket Part), *Lascaris*, *supra* n. 1; *see also* Mass. Gen. Laws Annot. ch. 117, § 1 (1973 Pocket Part). Food Stamps—7 U.S.C. § 2014(b); 7 C.F.R. §§ 271.1(s), 271.3. The study introduced in this case notes the availability of General Assistance from the date of demonstrated need but adds that most states attempt, after the federally mandated 30-day waiting period for AFDC-U, 42 U.S.C. § 607(b)(1)(A), to transfer individuals to that federally assisted program. Such a transfer is advantageous to the individual involved because, among other reasons, it automatically includes his family in the state's Medicaid program, 42 U.S.C. § 1396(a)(10).

[9] We have phrased these questions in general terms, although we are only dealing directly with the Rhode Island statute, because, as we noted in *Minter*, preemption decisions are to be made via macrocosmic rather than particularistic inquiries. Thus evidence as to the New York experience, with the questions rephrased to reflect the longer waiting period, and the Michigan experience, if sufficiently widespread, would be both relevant and significant.

In addition, we are fully aware that the impact of subjective expectations is less susceptible to proof. We include reference to expectations not to indicate that adequate proof regarding actual receipts would be insufficient to establish infringement—which would not be correct—but rather to suggest that proof of infringement need not be limited to cases of actual receipt.

of the payment of welfare benefits and food stamps, available from the moment of need, to strikers in thirteen strikes. In only four were any unemployment benefits paid, in each case in New York state. Whatever support this massive body of data would provide for a finding regarding the impact of receipt of welfare and food stamps on strike length, and as we note below that would seem minimal at best, it cannot support any finding regarding the impact of unemployment benefits not received until after seven weeks, in the absence of some effort to differentiate the separate impacts of the different forms of aid.

Only a small proportion (17 per cent) of strikers in all strikes studied received welfare aid roughly equivalent to unemployment benefits.[10] Our computations indicate that an even smaller proportion (7 and 13 per cent in the only two strikes for which relevant figures were provided) received unemployment benefits. It would not seem to us tenable to assume, *a priori,* that such a small percentage of the total strike force would have a determinative impact on a strike-related decision of a majority of workers.

Moreover, as the study itself admits, the exceedingly long strikes used in the study, during which strikers in relevant states could qualify for unemployment benefits, are highly atypical. As tables in the defendant's Handbook establish, the national average duration of work

[10] Although 60% of the strikers received food stamps, that form of aid is not comparable in value and hence in impact to unemployment benefits, as the stipulations in this case and the tables on national averages in the book's Appendix indicate. Here the average striker received $44.00 per *month* in food stamp values while the average unemployment benefit was $77.20 per *week*. That food stamps are complementary to, rather than competitive with, unemployment benefits is also suggested by the fact that the two benefits may be received at the same time. In contrast, the statutory prohibition against joint receipt of AFDC-U and unemployment benefits, 42 U.S.C. § 607 (b)(2)(C)(ii), and the similar amounts provided—in this case AFDC-U benefits were $280 per month—strongly suggest their comparability in value.

stoppages between 1936 and 1969, when unemployment benefits were available to strikers in Rhode Island and New York, ranged from a low of 5 days (in 1943) to a high of 25.6 days (in 1947). In the period from 1959-69, the percentage of work stoppages nationwide lasting 60 days or more never exceeded 11.7 per cent.

Aside from the irrelevance of welfare figures and the small proportion of persons and strikes affected, the present record suffers from a fundamental defect. It provides no support for a causal relationship between the receipt of benefits, which unions obviously desire and often actively seek, and longer, costlier strikes. It may be, as the senior author of the study testified, that "there is no way of really determining whether welfare use makes a strike longer or costlier". Yet the record lacks even a crude form of what we assume would be the most relevant and probative type of evidence—statistical comparisons of the length and cost of strikes in states granting unemployment benefits (Rhode Island and New York) and the length and cost of strikes of similar size in similar industries in other states not granting such benefits. Such general statistical data would at least provide some hard primary evidence on which to start analysis and base broad opinion surveys or other particularistic empirical approaches. Their weight would depend on the extent to which they considered and controlled for other factors potentially responsible for any disparities—such as the size and nature of the industry, the length and strength of union representation, past labor-management relations and prior strike history, the relative wage and benefit structure under the expiring agreement, and local cost-of-living or other economic or structural peculiarities.

The only attempt to provide the missing causal link is the transcription, presumably partial, of six interviews with labor, management and welfare representatives in two

particular strikes (out of a total of 60 interviews said to have been conducted). While we find these interviews oversimplistic and conclusory, and the answers accordingly wholly expectable, a more representative and sophisticated sampling of experience and attitudes directed at the effect of the actual or expected receipt of delayed unemployment benefits might be helpful to a court seeking to decide the relevant question of infringement.

STATE INTEREST

If a court were to find, based on relevant and persuasive evidence, that payment of unemployment benefits significantly frustrated the federal policy of collective bargaining, it would then have to consider whether the unemployment scheme represented a compelling state interest "so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act." *Garmon, supra,* 359 U.S. at 244. Here the district court found the interest so substantial as to override any frustration of labor policy, however significant. We are not prepared to so hold on the present record, especially given our doubts that the issue need be reached.

First, as we noted in *Minter,* the state interests in unemployment compensation and welfare do not appear on their face identical. Welfare payments, premised on a finding of need, are directed at alleviating real hardship —serious threats to the physical well-being, indeed in some cases survival, of individuals. Unemployment benefits, in contrast, are conditioned on a certain minimal amount of prior employment and earnings in a specified period, R.I.G.L. § 28-44-11, computed as a percentage of past earnings, within fixed outer limits, § 28-44-6 (additional amounts of $5.00 per week are paid for each dependent child under 18, up to a maximum of four dependents), and limited in duration to a certain percentage of prior weeks

worked, again with a fixed maximum (26 weeks), § 28-44-9. The amount of assets on hand or the nature of individual or family need are irrelevant. The state interest would then appear to be, as the statute's declaration of policy, § 28-42-2, indicates, the avoidance of "economic insecurity", or put another way, insurance against the temporary disruption of a flow of income.

Indeed, as to unemployment compensation for strikers, the state interest would appear somewhat narrower. The provision for such payments, § 28-44-16, by imposing an extra six-week waiting period in addition to the generally applicable one-week period, obviously does not insure an uninterrupted flow of income. Rather it seems aimed at preserving the standard of living and meeting the obligations previously undertaken with the reasonable expectation that the prior flow of income would continue. It is common knowledge (perhaps even judicially noticeable, if that were necessary) that consumer payment obligations in our increasingly credit-dependent society are monthly. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). One month's bills can usually be met from cash on hand (frequently derived from the last pay-check which is often distributed after the commencement of the strike) or delayed by discussions with understanding and rational creditors. A second flood will, however, often breach the dike. Indeed, although probably not essential to decision,[11] evidence might establish that more than two months' interruption of income

[11] Courts generally determine state interests from unchallenged state assertions, e.g., one-year residency requirements decrease the amount of welfare payments, or irrefutable policy concerns, e.g., the state has an interest in preventing voting frauds, rather than from evidence. Although we are not requiring evidence with regard to the state interests, we are not prepared to say that in this unusual kind of preemption case, *see* discussion *infra*, evidence might not be properly introduced and considered with regard to the substantiality, if not the very existence, of the state interests.

—and hence credit payments—would produce substantial defaults, with consequent foreclosures, repossessions (garnishment, of course, being a worthless remedy when no income exists) and even bankruptcies. The state certainly has an interest, the quantum of which we need not now decide, in avoiding such economic and social dislocations.[12]

Nevertheless, although purely statutory analysis suggests differences in the state's interest in welfare and in unemployment compensation, we are not certain that in practice the interests do in fact diverge. The district court stated, in its discussion under the heading "Conclusions of Law" that "It also appears that many of the Grinnell strikers would be receiving welfare were they not receiving unemployment compensation." 344 F. Supp. at 753. The record before the court indicated that no persons received both unemployment compensation and AFDC-U, *see also* 42 U.S.C. § 607(b)(2)(C)(ii); 45 C.F.R. § 233.100(c)(1)(v)(b), and that although 69 strikers were initially found eligible for public assistance, only 16 were still receiving such aid as of the date of the hearing because "the remainder were found ineligible because of increased income due to receipt of Unemployment Compensation benefits." Had there been a finding of fact that a substantial percentage of striking workers in Rhode Island would, if denied unemployment compensation, qualify for public

[12] We do not mean to intimate that we have found specific evidence in the legislative record or elsewhere that Rhode Island legislators had precisely these consumer problems in mind when, in 1936, they imposed this seven-week waiting period. Nor do we mean to exclude the possibility that the legislators specifically intended to force management to capitulate after seven weeks by aiding strikers. Bad motivation, however, will not vitiate otherwise sound legislation. *Palmer* v. *Thompson*, 403 U.S. 217 (1971). Moreover, since the state interest in such legislation may change over time, *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and since the object of this inquiry is the present effect on both federal labor policy and a state's interests, a court is obliged to consider possible present, as well as historical, rationales.

assistance, this would constitute a ground for concluding that in fact the state interest in unemployment compensation is substantially the same as its interest in welfare, the quantum of which we again need not decide now.

Finally, whether or not the evidence permitted a conclusion that the state interest served by welfare and unemployment was at bottom the same, a court could consider the secondary economic and social effects of unemployment payments or their absence. In *Minter,* we suggested at least two possible effects of financial aid—minimization of violence in labor disputes, insofar as caused by the bitterness attendant upon the hardships normally suffered by strikers, and avoidance of economic stagnation in local communities, by which we primarily meant the effect on local businesses of the sudden drop in consumer demand resulting from the abrupt and total termination of income for a substantial part of the community's families. The book, one author, and the project supervisor all indicate that the study, although showing incidents of violence in strikes where state aid was made available, did not provide any basis for a conclusion either way. The author and supervisor both stated, however, as a matter of common sense, that strikes in which assistance was provided to strikers might produce higher settlements with their generally attendant inflationary effects. The latter also suggested that longer strikes with costlier outcomes could make some employers non-competitive, thus forcing them to close, with the resulting long-term unemployment and local economic stagnation. Again, the complex nature of the issues suggests that empirical evidence and expert economic testimony as to the nature and scope of both the long-term impact on industry pricing and competitiveness and the short-term impact on consumer demand and the relationship between the two could assist courts in evaluating the substantiality of the state interest.

We are not unaware of the unusual nature of our insistence on an appropriate and detailed evidentiary basis for deciding the preemption issue, and in particular the issue of infringement of federal policy. We believe, however, that this is the unusual preemption case. For unlike *Garmon* labor preemption cases or non-labor preemption cases like *Florida Lime,* one cannot ascertain from the face of the statutes whether they affect the same activity. Similarly, although our statute, like that in *UAW* v. *Russell,* 356 U.S. 634 (1958), unambiguously announces the state interest promoted, the practical overlapping of parallel statutes and the complex and uncertain effects of the state action suggest that we cannot simply apply the relevant legal test to the statutes on their face. Our efforts to create an adequate evidentiary record should not, then, be taken in any sense as a departure from, or attempt to distinguish, the governing law of preemption;[13] they are merely attempts to apply that law to a most unusual circumstance.

For the reasons already described, we vacate the district court's denial of the preliminary injunction, reverse its grant of the defendants' motion to dismiss for failure to state a claim, and remand the case for further proceedings consistent with this opinion.

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[13] We are, however, aware of and impressed with the suggestions of Professor Cox for expanding the currently existing rule for non-*Garmon* labor preemption cases, which he suggests was enunciated in *Morton, supra,* into a single rule for all labor preemption cases. Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337 (1972). We are, of course, not in a position to adopt or reject such a test. In any case, although he does not discuss the kind of preemption case we are here faced with, we believe that his formulation is similar to our own statement of the existing rule for non-*Garmon* preemption cases and that it would, in our unusual case, probably still require the kind of evidence we have called for.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

No. 72-1275.

GRINNELL CORPORATION,

PLAINTIFF-APPELLANT,

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND,

DEFENDANTS-APELLEES.

Opinion.

June 15, 1972

Plaintiff, the Grinnell Corporation, seeks a preliminary injunction restraining defendants from paying unemployment benefits and public assistance to Grinnell's striking employees. Plaintiff argues that such payments substantially frustrate the policies of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 141 *et seq.* and intrude into an area preempted by that act. Moving to convene a three-judge court pursuant to 28 U.S.C. § 2281, plaintiff argues that G.L.R.I. (1956) §§ 28-44-1 *et seq.* which authorizes otherwise eligible persons to receive unemployment benefits if on strike, is unconstitutional under the Supremacy Clause.

The United Steelworkers of America, AFL-CIO, the union representative of the striking workers, and the Chamber of Commerce of the United States and the Greater Providence Chamber of Commerce have been allowed to intervene.

The matter in controversy is alleged to exceed $10,000. Jurisdiction is not contested and this Court finds jurisdiction to have been established.

Defendants have moved to dismiss the action on Rule 12 (b)(6), Fed. R. Civ. P., grounds and on grounds of stare decisis, citing *I.T.T.* v. *Minter,* 435 F.2d 989 (1st Cir. 1970), cert. den. 402 U.S. 933.

A three-judge court is not required where a state statute is attacked under the Supremacy Clause as being in conflict with a federal statute. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965). Accordingly, the motion for a three-judge court was denied. This Court held a hearing on preliminary injunction.

Findings of Fact

Unemployed persons otherwise eligible under Rhode Island law may receive unemployment compensation benefits after a one-week waiting period. R.I.G.L. § 28-44-14. A person who becomes unemployed because of participation in a strike and who is otherwise eligible must wait an additional six weeks to be entitled to benefits. R.I.G.L. § 28-44-16.

Following expiration of their collective bargaining agreement and of several months of negotiations, the 585 employees of the plaintiff, Grinnell Corporation at the Cranston, R.I., plant went out on strike on March 20, 1972. Some of the strikers have applied for and some receive forms of public aid, including Aid to Families with Dependent Children (AFDC), food stamps, and unemployment compensation. Mr. Joseph F. Murray of the Department of Social and Rehabilitative Services testified as to Grinnell employees receiving AFDC, food stamps, or General Relief. Eighty strikers applied for public assistance, some sixty-nine were found eligible, and sixteen of these receive aid. The remainder of the sixty-nine do not

get welfare because they receive unemployment compensation which lifts them above the standard of need. No striker received both unemployment compensation and welfare at the same time. Of the one hundred thirty seven strikers originally eligible for food stamps, only sixteen remained eligible and received stamps as of the time of the hearing. The average family benefit for the striking employees amounts to $280 per month.

The parties have stipulated that for the week ending May 13, 1972, four hundred and four of plaintiff's striking employees received a total of $31,190 in unemployment compensation, of which $29,425 was the benefit rate payable to all of the four hundred and four employees and $1,765 was the dependents' allowance payable to one hundred seventy three of these employees. The average benefit received by the striking employee who received unemployment compensation for that week was $77.20.

The parties have further stipulated that on April 26, 1972 the striking employees rejected plaintiff's strike settlement offer despite recommendations of acceptance by the International Union representative and the negotiating committee.

Conclusions of Law

It is the meaning and application of *ITT* v. *Minter*, 435 F.2d 989 (1st Cir. 1970), that comprises the central legal issue of this case. In *Minter* the First Circuit Court of Appeals affirmed the denial of a preliminary injunction against payment of welfare benefits to strikers on the ground that plaintiffs had not demonstrated probability of success on the merits. The Court found that the issue of irreparable harm merged into and became indistinguishable from the issue of probable success on the merits.

Noting that it was the first occasion on which a federal court had considered a confrontation between the national

policy of free collective bargaining and state welfare laws, the *Minter* court found little in traditional "preemption" analysis to aid it. Distinguishing *San Diego Building Trades* v. *Garmon*, 359 U.S. 236 (1958), the *Minter* court espoused a balancing process in which "both the degree of conflict and the relative importance of the federal and state interests are assessed," and stated:

> "Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, 'in the absence of persuasive reasons,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed 2d 248 (1963), or unless the administration of state law 'palpably infringes' upon the federal policy. Southern Pac. Co. v. Arizona ex. rel. Sullivan, 325 U.S. 761, 766, 65 S. Ct. 1515, 89 L.Ed 1915 (1945)." 435 F.2d at 992, 993.

Facing the problem of how to assess the extent of the conflict and the relative importance of the interests involved, *Minter* outlined elements of the requisite analysis:

> "On neither count—the issue of extent of conflict or the relative strength of the federal and state interests —would we feel confident in any *a priori* judgment. A court would first have to determine the quantum of impact on collective bargaining stemming from the granting of welfare benefits to strikers. If this is found substantial a court would then have to weigh the impact on the state of declaring needy strikers and their families ineligible for welfare against the extent to which making them eligible stripped state government of its neutrality in a labor-management dispute.
>
> "Such weighing exercises could not be restricted to an ad hoc exploration of the microcosm of these particular disputes. A court must deal with 'classes of

situations' and not 'judgments on the impact of . . . particular conflicts on the entire scheme of federal labor policy and administration,' *Garmon, supra,* 359 U.S. at 242, 79 S. Ct. at 778. Under such an approach, a court would be interested in how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; any studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc." 435 F.2d at 993.

Having catalogued these elements of proof, the Court went on:

"This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon would have to undertake, indicates the preferable forum to be the Congress. Congress would be particularly appropriate in resolving this issue. The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program. Congress has established the minimal requirements with which participating state welfare plan must comply. 42 U.S.C. § 602 et seq. We do not attribute heavy weight to Congressional silence, but we would doubt that if striker eligibility for welfare had a significant impact on labor-management relations, Congress would

be unaware of that impact. Moreover, if all the issue proves to be finely balanced, after weighing all the evidence, it may be sufficient justification for upholding the state action that Congress is always free to provide specifically for preemption. See Penn Dairies v. Milk Control Comm., 318 U.S. 261, 275, 63 S. Ct. 617, 87 L.Ed. 748 (1943).

"[4] In sum, wholly apart from the inadequacy of the evidence before the district court, we have substantial doubt that a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers or that, even so, the state interest is so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest. We accordingly hold that the district court did not err in concluding that plaintiffs' case did not have a sufficient probability of prevailing on the merits." 435 F.2d at 993-994.

The controversy arises over the meaning of these two paragraphs. Defendants contend that the *Minter* court by its "catalogue" evidenced its belief that courts are not suited to the type of investigation this issue requires, and that the issue is more appropriately resolved by the Congress. The issue presented here, they argue, is not justiciable and this case should be dismissed. Further, they argue, introduction of evidence is foreclosed by *Minter's* "substantial doubt" that the state interest is so insubstantial that Congress must be supposed to have deprived the state of its power to serve that interest. They also argue that there has been no significant frustration of federal labor policy.

Plaintiff argues that *Minter* turned on the fact that virtually no evidence was introduced at trial in that case, and that *Minter* spelled out the sort of evidence necessary

to show probability of success. Plaintiff here offers and has been allowed to introduce evidence of the sort catalogued in *Minter*. Plaintiff primarily relies on the testimony of two industrial researchers who have published a book, *Welfare and Strikers: The Use of Public Funds to Support Strikers* (1972). This evidence, plaintiff argues, proves that there has been substantial interference with federal collective bargaining policy because public aid has shifted the labor/management balance of power and has strengthened striker resolve. In any event, plaintiff claims, the instant case involves unemployment compensation and not welfare benefits and so is distinguishable from *Minter*.

This Court must disagree with plaintiff's contentions. For purposes of the issue at hand there is no distinctive difference between the Rhode Island statutory scheme providing unemployment compensation to strikers and the Massachusetts scheme providing welfare benefits. The Rhode Island legislature has declared its policy as to unemployment compensation:

> "28-42-2. Declaration of policy.—Economic insecurity, due to unemployment, being a serious menace to the health, morale and general welfare of the people of this state is, therefore, a subject of interest and concern to the community as a whole, warranting appropriate action by the general assembly to prevent its spread and to lighten the burden which now falls on the unemployed worker and his family. According to the report of the joint special commission appointed pursuant to the joint resolutions, adopted respectively on February 5, 1935, March 4, 1935, and April 4, 1935, the evidence seems conclusive that in the fact of recurring period of business depression, which industry and commerce appear powerless to prevent, the industrial worker's position is extremely insecure. The in-

dividual is as incapable of protecting himself against such unemployment, as industry is of preventing it. Experience has further shown that if the state delays action until unemployment becomes excessive, it can neither create promptly the organizations necessary to orderly, economical and effective relief, nor bear the financial burden of relief without disrupting its whole system of ordinary revenues and jeopardizing its credit. Chapters 42 to 44, inclusive, of this title are designed to meet in some measure this situation by providing for the accumulation of a fund to assist in protecting the public against the ill effects of unemployment which may arise in future years."

As this Court ruled in *Almac's, Inc.* v. *Hackett,* 312 F. Supp. 864, 967-68 (D.R.I. 1970);

"The Rhode Island unemployment compensation statute is part of a broad state-federal cooperative effort to protect citizens against economic vicissitudes. It was enacted at a time when there was both strong national and local feeling for the redress of certain economic evils which could eventuate from the unregulated play of market forces. Its operation has been consistent and continuing from 1936 to the present. That the federal government has shared in this operation is apparent from a reading of state and federal statutory law. § 28-44-1 et seq., G.L.R.I. 1956, as amended, 26 U.S.C. §§ 3301-3309, 29 U.S.C. §§ 49-49K. In particular the statute's statement of purpose § 28-42-2 G.L.R.I. 1956, as amended, makes clear the general welfare nature of the statute. *It must, therefore, be concluded that it was neither the intent nor the primary purpose of the statute as a whole to impinge upon federally established collective bargaining rights.*"

(Emphasis added.)

As to granting unemployment compensation to strikers, the Rhode Island legislature modified but hardly abandoned the salutary purpose behind its unemployment compensation scheme by imposing a penalty of a six-week waiting requirement. See *Annese* v. *Board of Review of Dept. of Emp. Sec.*, 249 A. 2d 46 (R.I. 1969). It also appears that many of the Grinnell strikers would be receiving welfare were they not receiving unemployment compensation.

Unemployment compensation is, as is welfare, a joint federal-state undertaking, and as the *Minter* court noted, it is difficult to believe that if unemployment compensation had a significant deleterious effect on federal labor policy, Congress would be unaware of it. I take note of the defeat of recent proposals in Congress to forbid states from granting unemployment compensation to strikers.[1]

Also as the *Minter* court noted, the state interest involved here is a substantial one. As I ruled in *Almac's*, supra, at 968:

> "In the instant case the imposition upon collective bargaining power of the grant or denial of state benefits is speculative and limited. On the other hand, the concern of the state for the well-being of its unemployed and ultimately for the health of the local community is a most important interest 'deeply rooted in local feling and responsibility.' "

In light of the strength of this interest, I share the substantial doubt of the *Minter* court that Congress has deprived the state of power to pursue this interest. One distinguished commentator has argued:

> "[I]f the underlying rationale for federal preemption is the need for preserving the balance which Congress struck, some formula is required to measure the outer limits of congressional concern.

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[1] See discussion in Comment, Welfare for Strikers: *ITT* v. *Minter*, 39 U. Chi. L. Rev. 79, 80 at n. 10 (1971).

> "Here again it seems possible to arrive at an answer by asking what Congress was doing when it enacted the national labor laws. Congress obviously had its own views concerning the special rights and duties to be imposed upon employers, unions, and employees because of their relation to employee self-organization and free collective bargaining. Where further particularization would be appropriate, it delegated the function to a specially constituted administrative agency. But it is equally plain that Congress developed this special framework for self-organization and collective bargaining within a larger context of state law creating rights of property, bodily security, and personalty, preserving public order, and promoting public health and welfare." Cox, Labor Law Preemption Revisted, 85 Harv. L. Rev. 1337, 1355 (1972).

And, as the *Minter* court found, the issue is one for decision by the Congress, not the Courts. See *Comment, Welfare for Strikers: ITT* v. *Minter,* 39 U.Chi.L.Rev. 79, 110 (1971).

Bound by *Minter* I hold that the preliminary injunction must be denied on two grounds. First, the issue is appropriate for resolution by Congress, not by this Court. Second, Congress cannot be supposed to have denied the state the power to provide for its general welfare by providing unemployment compensation here. The state's interest is so substantial that this Court will not conclude that Congress has excluded such state action. For these reasons and on the basis of my holding in *Almac's,* supra, the motion to dismiss is granted. Because of the holding of this case I make no findings on the issue of infringement of the federal collective bargaining process. Defendants shall prepare an order accordingly.

RAYMOND J. PETTINE
Chief Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 72-1275.

GRINNELL CORPORATION,
PLAINTIFF, APPELLANT,
v.
MARY C. HACKETT, ETC., ET AL.,
DEFENDANTS, APPELLEES.

No. 72-1276.

GRINNELL CORPORATION,
PLAINTIFF,
v.
MARY C. HACKETT, ETC., ET AL.,
DEFENDANTS, APPELLEES.

THE CHAMBER OF COMMERCE OF
THE UNITED STATES ET AL.,
INTERVENORS, APPELLANTS.

JUDGMENT

Entered: March 15, 1973

These causes came on to be heard on appeals from the United States District Court for the District of Rhode Island, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court granting defendants motion to dismiss the complaint, and denying and dismissing plaintiff's prayer for injunctive relief is vacated, and the case is remanded

to that court for further proceedings consistent with the opinion filed this day. Costs to appellants.

By the Court:

(s) DANA H. GALLUP

Clerk.

[cc: Messrs. Vetter, Allen, Cohen and Pyle.]

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IN THE

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OCTOBER TERM, 1972.

No. 72-1679

MARY C. HACKETT AND JOHN J. AFFLECK,
Petitioners,

vs.

GRINNELL CORPORATION,
Respondent.

No. 73-129

GRINNELL CORPORATION,
Petitioner,

vs.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND,
Respondents.

JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

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INDEX.

	PAGE
Questions Presented	2
Supplemental Statement of the Case	2
Reason for Granting the Petitions for Writs of Certiorari	4
A. This Case Presents a Recurrent Question of Federal Law Which Has Not Been, but Should Be Settled by This Court	4
B. The First Circuit Has Misconstrued the "Governing Law of Preemption"	6
C. The Decision Below Threatens to Fragment the Cornerstone of Federal Labor Policy! the Collective Bargaining Process	7
Conclusion	10

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Delaware Coach v. Public Service Commission, 265 F. Supp. 648 (Del. 1967)	7, 8
The Dow Chemical Company v. Taylor, ... F. Supp. ...., 57 F. R. D. 105 (D. C. E. D. Mich. pend.)	5
Florida Lime & Avocado Growers v. Paul, 373 U. S. 132 (1962)	8
Francis v. Davidson, 340 F. Supp. 351 (D. C. Md. 1972), aff'd. per curiam 404 U. S. 904 (1972)	5
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Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971) 4

Motor Coach Employees v. Missouri, 374 U. S. 74 (1963) 8

N. L. R. B. v. Insurance Agents Union, 361 U. S. 477 (1960) 7

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Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 5

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Oil Chemical & Atomic Workers v. Arkansas Louisiana Gas Co., 332 F. 2d 64 (10th Cir. 1964) 7

Perez v. Campbell, 402 U. S. 637 (1971) 7

Russo v. Kirby, 453 F. 2d 548 (2d Cir. 1971) 5

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 4, 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1679.

MARY C. HACKETT AND JOHN J. AFFLECK,
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vs.

GRINNELL CORPORATION,
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vs.

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Respondents.

JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

Respondents,[1] The Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce (hereafter collectively the "Chambers"), urge this

1. The Chambers, as appellants below, are respondents herein under Rule 21(4) of this Court. The Chambers have been permitted until August 15, 1973, to file a response to the cross-petitions for writs of certiorari filed by the State of Rhode Island and Grinnell Corporation.

Court to grant both of the captioned petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

QUESTIONS PRESENTED.

1. Whether, where state and federal legislation do not appear on their face to regulate the same activity, federal preemption may be found only where the state legislation palpably infringes upon federal policy *and* the federal interest is balanced against and found more compelling than the state interest?

2. What is the correct standard for determining whether the payment of a substantial state subsidy to striking employees obstructs the federal scheme of free collective bargaining?

SUPPLEMENTAL STATEMENT OF THE CASE.

In May, 1972, the Grinnell Corporation, then undergoing a strike by its employees affiliated with the United Steelworkers of America, filed suit in federal district court for a declaratory judgment and to enjoin the State[2] from continuing to pay unemployment compensation benefits to over 90% of its striking employees. The benefits, equal on average to over 70% of the employees' pre-strike take-home pay, were provided, pursuant to a uniform state policy, after the employees had met the requisite statutory waiting period.[3]

Recognizing the significant effect of such payments upon their memberships in the State of Rhode Island, the Chambers

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2. Both Petitioners, Mary C. Hackett and John J. Affleck, are officers of the State of Rhode Island, alleged to be acting pursuant to the laws of Rhode Island, and will be referred to herein as the "State."

3. See G. L. R. I. (1956), §§ 28-44-1 through 28-44-61, as amended.

intervened pursuant to Rule 24, F.R.C.P.[4] The Chambers asserted that the State's policy of providing strikers with substantial subsidies, in the form of unemployment compensation, prolongs strikes and/or increases the cost of collective bargaining agreements to employers, and that the effect of such payments was antithetical to the State's interests. On June 16, 1972, the District Court, after holding an evidentiary hearing on a motion for a preliminary injunction, sustained a motion to dismiss filed by the State. The court, refusing to make findings of fact as to the effect of the disputed policies upon collective bargaining, held: (1) that the payment of unemployment compensation benefits to strikers is an issue "appropriate for resolution by Congress, not by this Court"; and (2) that, despite Grinnell's and the Chambers' allegations of, as well as testimony to demonstrate, a frustration of federal policy, such state action was not prohibited by the Supremacy Clause because "[t]he State's interest is so substantial" that, as a matter of law, it cannot be precluded from granting strikers the disputed subsidies.

On appeal, the Court of Appeals for the First Circuit was "unable to affirm the District Court on either ground." Rhode Island's Pet., p. 17. The First Circuit, instead found the "preemption issue is justiciable;" however, rather than reversing that Court, the Court of Appeals remanded subject to an admittedly "unusual . . . insistence on an appropriate and detailed evidentiary basis . . .". Rhode Island's Pet., p. 34. The Court refused to conclude that collective bargaining is affected by the availability of the substantial payments to strikers and denigrated expert testimony that the payments of, or availability of, state

4. The U. S. Chamber, with a direct business membership in excess of 38,000 employers, and 3,700 state and local chambers of commerce, with an underlying membership of 5 million businesses and individuals, is the largest association of business and professional organizations in the United States. Similarly the Providence Chamber, an affiliate of the U. S. Chamber, is the largest association of employers in Rhode Island. Many are subject to the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*

subsidies will "increase the propensity of a union to undertake strikes, . . . and the probability that they will be longer, costlier or both."[5] The First Circuit required, instead, that a complex " 'catalogue of data relevant to a macrocosmic weighing' " was required to be presented by the plaintiff to show a substantial frustration of federal policy. And, even assuming such frustration, a variety of "compelling state interests" (Rhode Island's Pet., p. 30), *e.g.*, economic hardship, local commercial stagnation, would validly justify such an instrusion on federal labor policy. The Court of Appeals recognized "the unusual nature" of its proposed means for deciding "the issue of federal policy." Rhode Island's Pet., p. 34. It concluded, however, that only in this manner could the "governing law of preemption" be applied to the circumstances of this case.

REASONS FOR GRANTING THE PETITIONS FOR WRITS OF CERTIORARI.

A. This Case Presents a Recurrent Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The recurring labor preemption problem of the past was articulating a rule from which the lower federal and state courts could determine the limits of their jurisdiction when dealing with labor related matters. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971). The open issue which must now be determined—and an issue of similar magnitude[6]—is the permissible extent of the States' legislative pow-

5. Thieblot and Cowin, *Welfare and Strikes*, University of Pennsylvania Press (Phil. 1972), p. 217—Plaintiff's Exhibit 1 below. See also Dr. Thieblot's testimony that:

> "We find that there is something of a movement in the direction of the union eliminating strike benefits to workers who are going on welfare, and this in our view is tantamount to saying that the . . . public treasury is to some extent a major strike fund." App. Tr. 70, below.

6. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337-1339 (1972): "From 1945 to 1960 no aspect of labor-

er, albeit perhaps directed at non-labor objectives, to modify the collective bargaining process. Admittedly, even prior to *Garmon*, this Court declared that:

> For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes or by methods which the federal Act prohibits. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953).

It is now necessary to determine specifically (1) what test must be satisfied to demonstrate such an impingement in the "area of labor combat;" and (2) which State interests, where such a test is satisfied, should be permitted to prevail and leave the "national system for the implementation of this country's labor policies . . . dependent on State law." *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967). State subsidies to strikers, who would not otherwise receive such benefits but for their decision to strike, the issue here, typifies that problem and is a recurring subject of judicial controversy.[7] As such, the pending petitions are appropriate vehicles for this Court's formulation of a preemption standard to protect the uniformity of the national labor policy. Cf., *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 93 S. Ct. 1817 (1973), where this Court de-

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management relations law gave rise to as much litigation and diversity of judicial opinion as the problems of fitting the basic federal labor legislation—the National Labor Relations Act, the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act—into the surrounding legal system. . . . Today the wind carries scent of change—or at least of reexamination. . . . The occasion seems ripe, therefore, for a review of the development of, and basic issues in, the law pertaining to federal occupation of the field of labor disputes.

7. See, e.g., *Super Tire Engineering Company* v. *McCorkle*, 469 F. 2d 911 (3rd Cir. 1972), *pet. for cert. pend.* No. 72-1554; *Lascaris* v. *Wyman*, ... N. Y. ..... (N. Y. Ct. of App. 1973), *pet. for cert. pend.* No. 72-1726; *The Dow Chemical Company* v. *Taylor*, ... F. Supp. ...., 57 F. R. D. 105 (D. C. E. D. Mich. *pend.*); *Francis* v. *Davidson*, 340 F. Supp. 351 (D. C. Md. 1972), *aff'd. per curiam* 404 U. S. 904 (1972); *I. T. T.* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970) *cert. den.* 402 U. S. 933, *pet. for reh. den.* 404 U. S. 824 (1971); *Russo* v. *Kirby*, 453 F. 2d 548 (2d Cir. 1971).

fined, in a similar procedural situation the applicable rules that should prevail in the retrial of a suit under Title VII of the 1964 Civil Rights Act. A formulation of the appropriate pre-emption test to govern the retrial of this case is equally necessary.

B. The First Circuit Has Misconstrued the "Governing Law of Preemption".

The First Circuit has, through the novel preemption approach utilized here, left the determination of the supremacy of federal policy largely dependent upon the financial resources of a plaintiff. This view severely distorts the important and recurrent area of federal preemption[8] and miscontrues the decisions of this Court.

The Court has heretofore required that, for a state "[t]o restrict either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959)], or the forms of pressure which are permissible [see *Teamsters, Local 20* v. *Morton*, 377 U. S. 252 (1964)] tips the scale towards management or union"[9] without regard to the state's objective, and is, therefore, impermissible. In neither situation, however, was any empirical evidence considered, let alone the "macrocosmic" and "complex" record required in this case by the First Circuit. In *Morton*, for instance, where this Court invalidated a state law even though the particular conduct it regulated was not arguably

8. Federal preemption cases engender considerable controversy and frequently necessitate review by this Court. See, e.g., from this Court's last term, *New York State Dept of Soc. Services* v. *Dublino*, ... U. S. ...., 41 U. S. L. W. 4925 (June 21, 1973); *Burbank* v. *Lockheed Air Terminal, Inc.*, ... U. S. ...., 41 U. S. L. W. 4600 (May 14, 1973). *U. S.* v. *Little Lake Misere Land Co.*, 453 F. 2d 360 (5th Cir. 1971), *cert. granted*, ... U. S. ...., 41 U. S. L. W. 3183 (Oct. 10, 1972); *Goldstein* v. *California, cert. granted*, ... U. S. ...., 40 U. S. L. W. 3568 (May 30, 1972). If new rules are to be formulated in this area, accordingly, they should be made by this Court and not a lower tribunal.

9. Cox, *op. cit.*, p. 1353.

proscribed or protected by federal law, the plaintiff was not required to demonstrate on any "macrocosmic" standard that its activities were an integral component in the bargaining process. This Court, indeed, has inferred, without evidence, that certain restraints have a "direct tendency to frustrate" federal policy and that financial pressure influences human conduct. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967). Accord: *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398; 208 N. E. 2d 516, 524 (1965). *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (Del. 1967).[10] It is precisely that inference, however, which the court below refused to draw. The critical determinant now, accordingly, is the sheer practical and financial burdens of satisfying an empirical test: absent a plaintiff capable of incurring this burden the states are free to intrude substantially into the federal scheme. Such a radical restructuring of the sensitive area of state-federal relations warrants consideration by this Court. See *Perez* v. *Campbell*, 402 U. S. 637 (1971).

C. The Decision Below Threatens to Fragment the Cornerstone of Federal Labor Policy: the Collective Bargaining Process.

Notwithstanding the appropriate test to determine whether there is an obstruction to federal labor policy, to permit the amorphous variety of state interests considered by the First Circuit to prevail would open the collective bargaining process to frequent, and varying, intrusions by the States. The federal scheme provides for a "brute contest of economic power" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477, 489 (1960)) which, it is submitted, Congress only can modify.

10. See, also the various cases in which publicity by state boards of concilation has been held to be an impermissible intrusion, again without empirical evidence, upon the federally protected process of free collective bargaining. *General Electric Company* v. *Callahan*, 295 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1966).

See, *e.g.*, the Food Stamp Act, 7 U. S. C. 2014(c).[11] Although the collective bargaining process has variegated, disruptive social side-effects, including short term economic hardships, Congress has nevertheless concluded that the "free opportunity for negotiation . . . is likely to promote industrial peace" (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937)) and the social welfare. See 29 U. S. C. §§ 141, 151. Accordingly, absent violence, which strikes at the very social order itself, such difficulties are insufficient to justify permitting State by State variations, under the guise of exercising a police power, in the balance struck by Congress.[12] See, *e.g.*, *Motor Coach Employees* v. *Missouri*, 374 U. S. 74, 80-81 (1963) where the use of "emergency legislation", passed "to protect the public from threatened breakdowns in vital community services", was prohibited. See also, *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (Del. 1967). The

11. See the most recent Congressional debates in the disbursement of food stamps to strikers, Vol. 119, Cong. Rec. H. 6322-6334 (July 19, 1973, daily ed.), in which Congress expressly considered all aspects of the question. No such Congressional consideration has ever been afforded the payment by the states of substantially higher unemployment compensation benefits. Here the benefits amounted to 72% of the strikers take-home pay.

12. Indeed in the instant case the fact that forty-eight states expressly exclude strikers from receiving unemployment compensation benefits is an impressive indication that the current Rhode Island policy sacrifices the general welfare in favor of the unions' welfare. Moreover, notwithstanding the real state interest, once it has been shown that the statute "stands as an obstacle to the full effectiveness of a federal statute . . ." (*The Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U. S. 714, 722 (1963)), or "clashes" directly or indirectly with the "objectives" of federal policy (*Sears, Roebuck and Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964)), the interference by the state is prohibited. Neither the similarity nor difference between the objectives of state and federal law (*Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141-142 (1962); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955)) nor the "relative importance to the State of its own law is . . . material." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). In sum, it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959).

First Circuit has, however, invited such variation in the national labor scheme. Such an invitation is a matter only for this Court.[13]

13. As the Committee on State Labor Law of the Section of Labor Relations Law of the American Bar Association stated in its 1972 Report: "The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion. (footnotes omitted)." American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301.

CONCLUSION.

For each of the foregoing reasons the Chambers respectfully request that this Court grant both pending petitions for certiorari.

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